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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ..... 2 & 2A

OPINIONS BELOW 3

REPLY TO RESPONDENTS STATEMENT 4

REPLY TO RESPONDENTS ARGUMENT

RESPONDENTS STATE:
I. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SEVENTH CIRCUIT 9

RESPONDENTS STATE:
II. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SECOND CIRCUIT 29

RESPONDENTS STATE:
III. THAT THERE IS NOTHING TO PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS 33

RESPONDENTS STATE:
IV. THAT PETITIONER RAISES NO GENERALLY SIGNIFICANT QUESTION OF FEDERAL LAW ... 36

RESPONDENTS STATE:
V. THAT AS TO PETITIONER'S APPEAL THE COURT OF APPEALS DECISION WAS CLEARLY RIGHT. 36

CONCLUSION 37

TABLE OF CITATIONS

Cases

Page

Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 410F.2d 135 (7th Cir., 1969), cert. den. 396 U.S. 838 26-27

U.S. v. Peltz, 433 F.2d 48 (2nd Cir.,1970), cert. den. 401 U.S. 955 29,32

Statutes

Securities Exchange Act of 1934

Section 7, 48 Stat. 886; 15 U.S.C. § 78g 12

Section 10(a) 29

Section 10(b), 15 U.S.C. § 78j, 48 Stat. 891 .....4,9-10 15-16,22,29,32,36

Section 20(a) .....

Section 29(b), 15 U.S.C.A. § 78cc(b) 10

S.E.C. Rules

Rules Promulgated Under The Securities Exchange Act of 1934

Rule 10a-1 21,29
Rule 10a-1(c) 11.20
Rule 10a-2 .....,21
Rule 10b-5.4.9-10,15-16,22,28-29,32,36

Page

Regulation T

Regulation T, Section 220.3(g) 12,16
Regulation T, Section 220.4(a)(2) . 23
Regulation T, Section 220.4(f)(6) . 23

Federal Rules Civil Procedure

Rule 1 33
Rule 15(b) 9

Rules of New York Stock Exchange

Rule 345 14,27
Rule 405 22

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OPINIONS BELOW

There were no District Court opinions, reported or unreported. The opinion of the Court of Appeals for the First Circuit (App. A to Petition) is reported at 43 F.2d 365.

REPLY TO RESPONDENTS STATEMENT

Respondents state on Page 2, the last paragraph,
"As set forth in the complaint upon which the action was tried, (A. 67-73)*, plaintiff (now petitioner) made essentially two claims, first that his account had been excessively traded or "churned" and second, that he had been extended excessive credit in violation of Regulation T of the Federal Reserve Board".

Facts - The above statement is in gross error. The case was tried by implied consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (See Page 9 to 26 of this Brief).

Respondents state on Page 3, the last paragraph,
"Commencing in March,1963, there were a number of short sales and subsequent purchases of the same stocks (Exs. 5-d

---

* Record references in this brief are as follows:
A.- Appendix of pleadings, etc.
Tr.- Trial Transcript
Pl. Ex.- Plaintiff's Exhibits as contained in separate bound volumes
Pet.- The instant petition for certiorari

through 5-0, 11-A & B). The principle securities involved were Xerox, Chrysler and Control Data (Ibid).

Facts - Plaintiff testified (Tr. 348), that a short sale has to be made in the short account.

Defendant Murphy testified (Tr. 974), that the number four account was the short account.

There was only one short sale of Xerox that was effected in plaintiff's #4 short account (Pl. Ex. 5-D and Pl. Ex. 11-A, Item 43).

There was only one short sale of Chrysler that was effected in plaintiff's #4 short account (Pl. Ex. 5-H and Pl. Ex. 11-B, Item 76).

There were three short sales of Control Data that were effected in plaintiff's account (Pl. Ex. 5-F & H and Pl. Ex. 11-B, Item 62, 72, 74).

Respondents state on Page 4, the first paragraph, (emphasis added), "As the market was generally rising, selling short resulted in losses (Tr. 917-8, 408). In August, 1963, Mr. Landry asked to have his account shifted to Ernest Anger, another registered representative in the Worcester office and a prior acquaintance of his (Tr. 110, 328-9, 1005-6).

Mr. Anger handled the account until late January or early February, 1964 (Tr. 332, 1012-5). During this five months period there were some 32 transactions in the account (Tr. 332-3, Exs. 5P through 6B, 11B and C). These included further short sales. (Ibid).

Facts - There were no short sales that were effected in plaintiff's #4 short account during that period (Pl. Ex. 5-Q, 5-S, 5-U, 5-W, 6-B and Pl. Ex. 11-B & C).

Respondents state on Page 4, paragraph 2,
"Following further losses and an unanswered written demand for additional margin, the account was liquidated in May,1964 (Tr. 133-5, Ex. 6I and J, 11C,19)".

Facts - The respondents fail to state what occured prior to the liquidation.
Plaintiff testified (Tr. 339-340), that he made a complaint to defendant brokerage firm on May 18th, through a letter of complaint. Defendant Murphy testified (Tr. 978) that he received the complaint.
Plaintiff testified that he received a telegram May 21st demanding $37,000 (Tr. 133 to 135 & Pl. Ex. 19)

Said telegram indicates that Hemphill, Noyes & Co. allowed plaintiff's account to go $37,000 below New York Stock Exchange margin requirements.

Respondents state on Page 4, last paragraph (last sentence), (emphasis added), "Following the close-out of the Landry account, it was discovered that serious errors had been made by the margin clerk handling the account (Tr. 733-7).

Facts - Plaintiff testified (Tr. 135 & Pl. Ex. 19), that his entire account was liquidated on May 25, 1964.
Almost ten months later, on Mar. 5, 1965 (A. 5), an affidavit of Herman H. Kuver, a member of the partnership of Hemphill, Noyes & Co., was filed with the U.S. District Court. Said affidavit states (emphasis added), "At all times prior to the close of business on January 19, 1964, the accounts of the plaintiff and transactions thereon were more than adequately margined in accordance with the requirements of the rules of the New York Stock Exchange and Regulation T of the Board of Governors of the Federal Reserve Bank, with an excess of such margin available for future transactions of $37,688 at

the close of business on January 19, 1964". (emphasis added) (A. 156)

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission, testified (Tr. 506), that on Nov. 21, 1963 there was a deficiency in plaintiff's account of $93,001.02, and on Dec. 31, 1963 a deficiency of $43,103.53 (Tr. 479), and that on Jan. 24, 1964 a margin deficiency of $47,818.98 (Tr. 480).

Defendant Winchester testified (Tr. 691, 858 to 860) that it was in January 24, 1964 when it was first brought to his attention that plaintiff's account was undermargin.

This would be 5 months before the account was liquidated (Pl. Ex. 19).

Defendant Winchester testified (Tr. 862) (emphasis added), that even though he knew that plaintiff's account was under margin, a purchase was made in plaintiff's account in April.

Defendant Winchester testified (Tr. 624), each salesman has to know his customer, and each salesman, every margin account we have, we have a pretty fair idea of how the account stands (emphasis added).

RESPONDENTS STATE:

I. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SEVENTH CIRCUIT

An excerpt from Respondents Brief, Page 6 and Page 7, is as follows, "--- the case was tried and considered by the courts below on two entirely different theories of liability, namely, churning and losses resulting from violations of Regulation T".

Facts - The above statement made by the Respondents is in error because the case was tried by implied consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. (F.R. Civ. P., 15(b)) (A. 226-7).

On March 2, 1971, the fourth day into the trial, Plaintiff's Trial Brief (A. 215 to 227) was filed with the District Court (A. 14).

On March 3, 1971 the Plaintiff's Trial Brief was discussed (Tr. 464). The District Court stated (Tr. 464), "---order that evidence henceforth be limited to the

transactions set forth in this trial brief, and you will be guided accordingly from this point out". (See also Tr. 652 and A. 226)

As is indicated in the Appendix which was before the Court of Appeals and transmitted to this Court, on Page 226-7 of said Appendix, indicates that the theory of liability was in regards to fraudulent and deceitful practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and that under Section 29(b) of the Securities Exchange Act of 1934 states, in essence, that every contract made in violation of any provision of that title or of any rule or regulation thereunder, shall be void and implies that damages and rescission may be recovered.

Plaintiff's Trial Brief was discussed by the District Court (Tr. 464, 553-4, 650-1-2 to 673).

Petitioner's case was tried by implied consent of the parties on the theory of liability with respect to certain fraudulent practices committed by the defendants in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

As can be seen in the following pages, there was a preponderance of evidence which supports plaintiff's allegations.

Some of the charges made in Plaintiff's Trial Brief are as follows (A. 215 to 227);

Fraudulent and deceitful activities in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, such as,

(a) When defendant Murphy first took over plaintiff's account, he was not a registered representative.

(b) This fact was never announced to the plaintiff.

(c) When the defendant company over extended credit to the plaintiff, and in each case where there was an over extension, the defendants failed to notify the plaintiff and failed to liquidate his account.

(d) Defendants effecting certain securities transactions as "long" sales when it was required that they be effected as "short" sales.

(e) Defendants "churning" plaintiff's account.

(f) Hemphill, Noyes & Co. violating Rule 10a-1(c) promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934, Section 10, by executing transactions in the margin account of plaintiff as "long" sales when they were not carried in the plaintiff's account and Hemphill, Noyes & Co.

were not informed that petitioner owned the securities so sold.

(g) Defendant Hemphill, Noyes violated Regulation T, Section 220.3(g) by failing to "net out" plaintiff's position when he was holding a "long" and "short" position simultaneously in the same security.

(h) Violations of Section 7 of the Securities Exchange Act and provisions of Regulation T as a result of over extending credit in plaintiff's account.

(i) Defendant company allowed plaintiff's account to go $37,000 below New York Stock Exchange margin requirements.

The evidence, at the trial, substantiated all of the charges made in Plaintiff's Trial Brief (A. 215 to 227).

The District Court and attorneys discussed the subject matter in regards to 10(b) claim (Tr. 1049-1050-1051-1052-1053-1054,1061-1062). Petitioner's attorney outlined to the District Court the evidence in regards to the fraudulent misrepresentations.

The District Court refused to submit to the jury (Tr. 1054) a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b). (Tr. 1049-1050).

This matter is now before this Court.

The evidence indicates that the case was tried by implied consent of the parties to the issues contained in plaintiff's amended complaint (A. 139 to 150) which was filed on Nov. 8, 1968 and denied on Oct. 8, 1970 (A. 9-10).

The evidence, at the trial, supports the allegations contained in plaintiff's amended complaint which was denied (A. 139 to 150).

The denial of plaintiff's amended complaint which was filed on Nov. 8, 1968 and denied on Oct. 8, 1970 was before the Court of Appeals who rejected petitioner's issue without discussion.

This matter is now before this Court (Pet. 15, Question 20).

As can be seen below the case was tried by implied consent of the parties and the evidence supports plaintiff's amended complaint which was denied.

> As indicated in Petitioner's Petition (Pet. 58 to 60), defendants admitted, at the trial, that defendant Hemphill, Noyes and defendant Walter Winchester permitted and assisted defendant Philip J. Murphy to effect securities transactions in plaintiff's account and to receive commissions on said transactions when defendant Murphy was not a registered representative.

Plaintiff testified (Tr. 84), that defendant Murphy never indicated to him that he wasn't a registered representative.

The District Court (Tr. 1063) refused to instruct the jury, on plaintiff's requested instruction (A. 237, No.//), in regards to the Rule of the New York Stock Exchange applicable to plaintiff's action and to the trial evidence, which is Rule 345 of the New York Stock Exchange, which states, (a) No member or member organization shall (1) permit any person to perform the duties customarily performed by a registered representative unless such person shall have been registered and is acceptable to the Exchange.

A timely objection was made, at the trial, to the District Court's ruling (Tr. 1158).

The Court of Appeals rejected plaintiff's issue without discussion (Appendix to Pet. 102).

The matter is now before this Court.

There is another violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, by defendants misrepresenting to the plaintiff by forwarding to the plaintiff monthly statements which showed certain sales to be "long" sales when, in fact, they were required to be effected as "short" sales (A. 225).

Plaintiff testified (Tr. 375, 104), that according to the monthly statement (Pl. Ex. 5-I), that on June 19, 1963 there was a long sale of 100 shares of Xerox in margin account.

Defendant Murphy testified (Tr. 979 to 982), that he executed said transaction as a long sale in plaintiff's margin account (emphasis added).

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission, testified (Tr. 455) that the transaction of June 19, 1963 should have been treated as a short sale (emphasis added).

The transaction on June 19, 1963 is settlement date (Tr. 687) and June 13, 1963 is trade date.

Plaintiff's Exhibit 43 (Tr. 767), (emphasis added), was reoffered by the defendants, was marked in evidence, and stipulated to by the defendants (Tr. 760). Plaintiff's Exhibit 43 indicates that the transaction of 100 shares of Xerox described above, actually, had been effected as a "long" sale and should have been, as required, effected as a "short" sale.

There is a further violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 when the defendant company over extended credit to the plaintiff on 16 separate occasions and in each case where there was an over extension, the defendants failed to notify the plaintiff and failed to liquidate his account.

The testimony and the evidence, at the trial, (Tr. 172, 176-177, 366, 375-376), indicates clearly that defendant Hemphill, Noyes violated Regulation T, Section 220.3(g) because of their failure to net out the plaintiff's position when he was simultaneously holding a "long" and "short" position in the same security (A. 218-9).

Plaintiff showed (Tr. 172) to the Court and jury, the loss of 4,667.11 which appears on plaintiff's monthly statement, Plaintiff's Exhibit 5-Pl.

Plaintiff (Tr. 376) showed to the Court and jury the figure of 4,667.11 which appeared in the LOSS column of Plaintiff's Chalk Exhibit 11-B.

Plaintiff testified (Tr. 375), that the Plaintiff's Chalk Exhibit (Pl. Ex. 11-A, B & C) was an exact replica of how the transactions were effected as shown on the monthly statements (Pl. Ex. 4-A through 6-M) and that the losses (Tr. 368) that appeared in the LOSS column of Plaintiff's Chalk Exhibit were reflected on plaintiff's monthly statements, and that the monthly statements and Plaintiff's Chalk Exhibits showed that when there was held simultaneously a "long" and "short" position in the same security, defendant Hemphill, Noyes failed to net out the two positions.

Plaintiff testified (Tr. 142), that on 14 occasions his account was simultaneously long and short the same security.

Defendants counsel admitted that there was a failure to net out (Tr. 394) (emphasis added).

The District Court stated, "They didn't net out in fact" (Tr. 395) (emphasis added).

Plaintiff testified (Tr. 149), that the monthly statements indicated that there was a loss of approximately $96,000.

Plaintiff's Chalk Exhibit 11-C, the last column of said Exhibit, was a column entitled, LOSS, which indicated a total loss of 96,196.33.

There was an offer of proof (Tr. 582, 588-589) made on behalf of the plaintiff, that Mr. Thomas Staiti, Certified Public Accountant (Tr. 511), would have testified in regards to the three accounts* of plaintiff and plaintiff's Exhibit 42 was marked for Identification.

Plaintiff's Exhibit 42 which was marked for Identification, indicates, among other matters, a figure in the column marked, Losses, an amount of 96,196.33.

The defendants (Tr. 368) objected to the LOSS columns on Plaintiff's

* cash account, margin account, short account (TR. 514)

Chalk Exhibit (Pl. Ex. 11-A, B & C) and the District Court ordered (Tr. 721-722) the LOSS column of Plaintiff's Chalk Exhibit be removed and marked for Identification.

This was one of the issues raised by plaintiff-petitioner before the Court of Appeals and is now before this Court (Pet. 11, Question 7).

Prior to petitioner's oral argument before the Court of Appeals, petitioner observed that one of the LOSS columns which had been marked for Identification, had been tampered with, as someone had neatly cut off a section from the bottom of Pl. Ex. 11-B which had been marked for Identification, which contained the figure of 4,667.11, and said cut off section was missing.

Petitioner informed the Court of Appeals in his opening statement and again in his Petition for Rehearing (Pet. 106-7), of the above matter, and informed the Court of Appeals to refer to Plaintiff's Exhibit 11-B, the LOSS column marked for Identification which was filed with Plaintiff's Appendix and contains the complete LOSS column as it was originally.

Hemphill, Noyes & Co. violated Rule 10a-1(c) promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 as a result of Hemphill, Noyes & Co. executing transactions in plaintiff's account as "long" sales when the security to be delivered were not carried in plaintiff's account and Hemphill, Noyes & Co. were not informed that plaintiff owned the securities that were sold (A. 225).

There was an Exhibit in evidence, and stipulated to by the defendants (Pl. Ex. 43) which indicates that Hemphill, Noyes & Co. were effecting securities transactions in plaintiff's account as "long" sales when the plaintiff did not own the securities so sold which resulted in violation of SEC Rule 10a-1(c) described above.

There was a sale of Xerox Corp. with a Trade Date of June 13, 1963 and Settlement Date of June 19, 1963.

A long sale is when you have a stock in your account and you own it and you sell it and a a short sale is a sale of a security that you don't own (Tr. 31).

Defendant Murphy testified (Tr. 979 to 982), that he executed the Xerox transaction with a settment date of June 19, 1963 as a long sale in plaintiff's margin account.

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission testified (Tr. 455), that said transaction should have been treated as a short sale.

There was a stipulation to Plaintiff's Exhibit 43 (Tr. 757 to 760) and defendants (Tr. 769) reoffered Plaintiff's Exhibit 43 and it was marked in evidence.

Plaintiff's Exhibit 43 that was in evidence, indicates that said transaction, actually, it had been effected as a "long" sale and should have been, as required, effected as a "short" sale.

The District Court (Tr. 1062), refused to instruct the jury, on rules applicable to trial evidence, on plaintiff's requested instruction (A. 236, No. 9) that,
A "long sale" account according to the Securities Exchange Act, rule 10a-1 and rule 10a-2 is a sale of a security one owns.

A timely objection was made, at the trial, to the District Court's ruling (Tr. 1158).

The Court of Appeals rejected petitioner's issue without discussion (Appendix to Pet. 102).

Defendant Murphy testified (Tr. 963-964), in regards to "know your-customer rule", which is known as Rule 405 of the New York Stock Exchange.

Defendant Winchester testified (Tr. 624) in regards to know your customer.

Issues were raised in the District Court by implied consent.

The District Court refused petitioner's request to submit to the jury a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against petitioner prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

The Court of Appeals affirmed the action of the District Court (Pet. 102).

There was a preponderance of evidence that the records maintained by defendant Hemphill, Noyes of plaintiff's Special Miscellaneous Account under Section 4(f) (6) of Regulation T issued by the Board of Governors of the Federal Reserve System were kept on a woefully haphazard, repeatedly inaccurate, and inconsistent basis in violation of Regulation T (12 CFR 220), Section 220.4(a) (2).

Mr. Thomas J. Lanigan, defendants witness, (Tr. 727) that S.M.A. stands for Special Miscellaneous Account.

Defendants attorney stated (Tr. 406), to the Court and jury that Exhibit O is a reproduction of the original SMA maintained at the time.

The Court (Tr. 475) informed the jury that the handwritten account, so called, is the account as it was maintained at the New York office by a man who made computations and wrote in figures on this S.M.A. account and it was the one in existance at the time of these violations.

Mr. Joseph Shwartz, from the SEC,

testified (Tr. 506) that Exhibit O had obvious errors in it.

Defendants conceded (Tr. 466) that Exhibit O the handwritten SMA contains a number of inaccuracies.

Defendants witness, Mr. Thomas J. Lanigan, testified (Tr. 733-4), that there were serious errors in SMA on June 13th.

Defendant Murphy's testimony indicates in 1964 in reply to a question, when asked whether or not he made inquiries about plaintiff's affairs, Murphy replied, "I didn't have to make any inquiries" and in answer to a question, "Did you ever ask him what his financial position was?" and Mr. Murphy replied, "I assumed it was good." and also that Mr. Murphy didn't have any idea of how much money Mr. Landry could lose in the market (Tr. 964).

There was uncontroverted testimony by the plaintiff, that from January of 1962 to the end of May 1964 the total transactions amounted to one million two hundred thousand or one million two hundred and ten thousand (Tr. 146).

Defendant Winchester testified (Tr. 695,716) that Hemphill, Noyes received some $7,000 in commissions. Plaintiff testified (Tr. 150) that approximately $7,000 in commissions were paid.

Defendant Murphy testified (Tr. 942-3), that March 22, 1963 Market Tides letter, he was co-author of that one and in that letter defendant Murphy recommended the sale of long positions in Chrysler, and to take profits and defendant Murphy was shown plaintiff's Exhibit 29-D and defendant Murphy admitted that it was an investment letter dated March 22, 1963 that was published by Hemphill, Noyes & Company in regards to Chrysler which stated, "Over the next several years, the capital gains potential for Chrysler could be the greatest in the industry, and on this basis, I would still regard the stock as a distincly attractive speculation".

> One of the issues that was before the Court of Appeals was that, "The District Court Made A Prejudicial Error And Abused Its Discretion By Denying, On October 8, 1970, "Motion For Leave To File Amended Complaint" Which Was Filed On November 8, 1968".
>
> The Court of Appeals rejected petitioner's issue without discussion (Pet. 102).
>
> This matter is now before this Court (Pet. 15, Question 20).
>
> Petitioner should have been allowed to amend his complaint to conform with the evidence.

Respondents Brief on Page 7 (an excerpt) states,
"Nor is there any substantial factual similarity between this case an Buttrey".

The Respondents are in error, as is indicated below.

The decision of the Court of Appeals for the First Circuit, in this case, is in direct conflict with the decision of the Court of Appeals fro the Seventh Circuit on the same matter as indicated by the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 410 F.2d 135 (7th Cir. 1969) cert. den. 396 U.S. 838.

In that case the Court of Appeals stated (emphasis added), that the touchstone for determining whether or not a violation of a particular rule is actionable should properly depend upon its design "for the direct protection of investors".

Here one of the functions of Rule 345 is to protect the public, so that permitting a private action for its violation is entirely consistent with the purposes of the statutes.

The evidence, at the trial, showed that the defendants had a callous disregard of Rule 345 and its purpose to protect the public. Such a breach of fair practice undermines the protection of investors and surely plays an integral part in SEC regulation of Exchange members.

The defendants actions carries with it the gravest danger of engendering in the public a loss of confidence in the Exchange and its members, a kind of damage which can significantly impair fulfillment of the Exchange's function in our economy.

Rule 345 imposes an explicit duty unknown to the common law.

The Court of Appeals in the Buttrey case found that a violation of a rule of the New York Stock Exchange is actionable under the Securities Act and Rule

10b-5 of the Securities Exchange Act when a particular rule depends upon its design "for the direct protection of investors.

RESPONDENTS STATE:

II. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SECOND CIRCUIT

An excerpt from Respondents Brief, Page 7 (4th paragraph);

"There is no obvious resemblance or connection between Peltz and the instant case---"

The above statement made by the Respondents is in error, for reasons stated below.

In the case of U.S. v. Peltz, 433 F.2d 48 (2nd Cir., 1970), cert. den. 401 U.S. 955, Peltz was convicted on Four Counts of an indictment.

Count One charged Peltz with a conspiracy.

Counts Three and Four charged willful violations of § 10(b) of the Securities Exchange Act of 1934 and SEC's Rule 10b-5 in that Peltz had told two brokerage houses that sales of stock which he had ordered sold were long whereas they were short.

Count Five charged that Peltz willfully violated § 10(a), relating to short sales, and the Commission Rule 10a-1. (See 433 F.2d 49)

Defendant Murphy testified (Tr. 979 to 982) (emphasis added), that a long sale does not require margin and that a short sale requires margin. Defendant Murphy testified that he executed the transaction of one hundred shares of Xerox with a settlement date of June 19, 1963 as a long sale in plaintiff's number two margin account and that by executing said transaction as a long sale, the margin requirements was avoided. (Tr. 982)

Mr. Joseph Shwartz, from the United States Securities and Exchange Commission testified (Tr. 454-455), (emphasis added), that the transaction of June 19, 1963 of one hundred shares of Xerox that was effected in plaintiff's margin account, for purposes of Regulation T, should have been treated as a short sale requiring margin.

The transaction on June 19, 1963 is settlement date (Tr. 687) and June 13, 1963 is trade date.

Plaintiff's Exhibit 43 (Tr. 767), (emphasis added), was reoffered by the defendants, was marked in evidence, and stipulated to by the defendants. Plaintiff's Exhibit 43 indicates that the transaction of one hundred shares of Xerox described above, actually, had been effected as a "long" sale and should have been, as required, effected as a short sale.

Plaintiff testified (Tr. 104), that plaintiff's monthly statement, Plaintiff's Exhibit 5-I indicates that on June 19, 1963 there was a sale of a hundred shares of Xerox Corporation in plaintiff's type two margin account. Plaintiff testified (Tr. 375) that this was a long sale in margin account.

Type four account (Tr. 73) is the short account.

Defendant Murphy testified (Tr. 982), he was effecting securities transactions as long sales in order to avoid margin requirements.

As can be seen by the above and preceeding page, the monthly statements accurately reflect the manner in which securities transactions were effected in plaintiff's account by defendant Murphy and that there was no bookkeeping mistakes in monthly statements as purported in Respondents Brief on Page 7.

Defendant Winchester testified (Tr. 639), that he was in charge and had the responsibility for all of the men in his office and that (Tr. 866) he was aware of what was going on there. Defendant Winchester testified (Tr. 640), that everybody in his office were under his control and supervision at all times. Defendant Winchester testified (Tr. 713), that he was familiar with each confirmation slip that was sent out during the period 1962 to 1964. Defendant Winchester

testified (Tr. 635), that he examined plaintiff's monthly statement each month during the perion 1962 to 1964. Defendant Winchester testified (Tr. 634-640), that he was familiar with Regulation T and the terms long and short during the period 1962 to 1964.

Petitioner's Petition on Page 77 states that the evidence indicates that on 14 occasions the defendant brokerage firm effected securities transactions as long sales when the defendant brokerage firm should have effected these transactions as short sales.

As previously described, in the Peltz case, Peltz was convicted on Four Counts of an indictment. On Counts Three and Four, Peltz was found guilty of misrepresenting that his sales of stock were long when, in fact, they were short. The Court in that case said that the misrepresentations constituted violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

By analogy the defendants in this case misrepresented to the petitioner, and therefore violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by forwarding to the petitioner monthly statements which showed certain securities transactions being effected as "long" sales when in fact by SEC Rules, defendants should have executed these transactions as "short" sales.

RESPONDENTS STATE:

III. THAT THERE IS NOTHING TO PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

The Petitioner had 24 issues before the Court of Appeals. The first issue was, "DID THE PLAINTIFF RECEIVE A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION?"

Petitioner cited Rule 1 of the Rules of Civil Procedure for the United States District Courts.

Petitioner would never make a statement to the Supreme Court or to any Court that there was a conspiracy to deny petitioner a just, speedy and inexpensive determination of his action (Obstruction of justice), unless the petitioner had overwhelming evidence to substantiate the claim.

Petitioner will take this opportunity to reply to statements made on Page 9 of Respondents Brief in regards to petitioner's counsels.

The action was originally filed in June, 1964 by Lewis H. Weinstein, Esq. and Verne W. Vance, Jr., Esq. (A. 4). On Feb. 7, 1966 petitioner signed an agreement with the law firm. Petitioner had paid the law firm $6,000. A paragraph of the agreement states, "Attorneys will continue to represent Client and to prosecute the suit on Client's

same day, Garrity, D.J. allowed the withdrawal.

Petitioner engaged another attorney (A. 7) and paid this attorney $3,500. Subsequently, the attorney notified petitioner that they were going to withdraw. Petitioner objected to their withdrawal and a hearing was held (A. 7).

Petitioner informed the Court that he objected to the withdrawal and that he had already expended $9,500 in attorneys fees. Garrity, D.J. allowed the withdrawal.

As can be seen, the petitioner never had asked any of the above attorneys to withdraw.

Petitioner was presented documents, for his signature, by both previous attorneys. Petitioner refused to sign the documents as they were sham. One of the documents is entitled, "Compendium Of Notices To Admit Facts And Answers" and was signed by defendants counsel.

Garrity, D.J. ordered plaintiff pro se to file an answer to said Compendium (A. 8), which plaintiff pro se, did file (A. 83 to 123).

Said Compendium was discussed in a number of hearings that were held prior to the trial.

Petitioner then engaged his trial counsel. Petitioner's trial attorneys filed a motion to withdraw on the last day of the trial (Tr. 1164-1165). The District Court informed petitioner's attorneys, "It is a motion for leave to withdraw, but let me say this, that I don't knowthat it is a motion that I would be inclined to pass upon at this time in any event, inasmuch as counsel have a lien in this case, etc.".

The motion (Tr. 1165) was filed with no action taken until further notice.

The following day, petitioner's trial counsels sent a letter to petitioner informing petitioner that they had a lien against judgement and interest accrued on said judgement and that the amount of their lien is one-third of the total interest plus costs (See Pet. 86).

RESPONDENTS STATE:

IV. THAT PETITIONER RAISES NO GENERALLY SIGNIFICANT QUESTIONS OF FEDERAL LAW

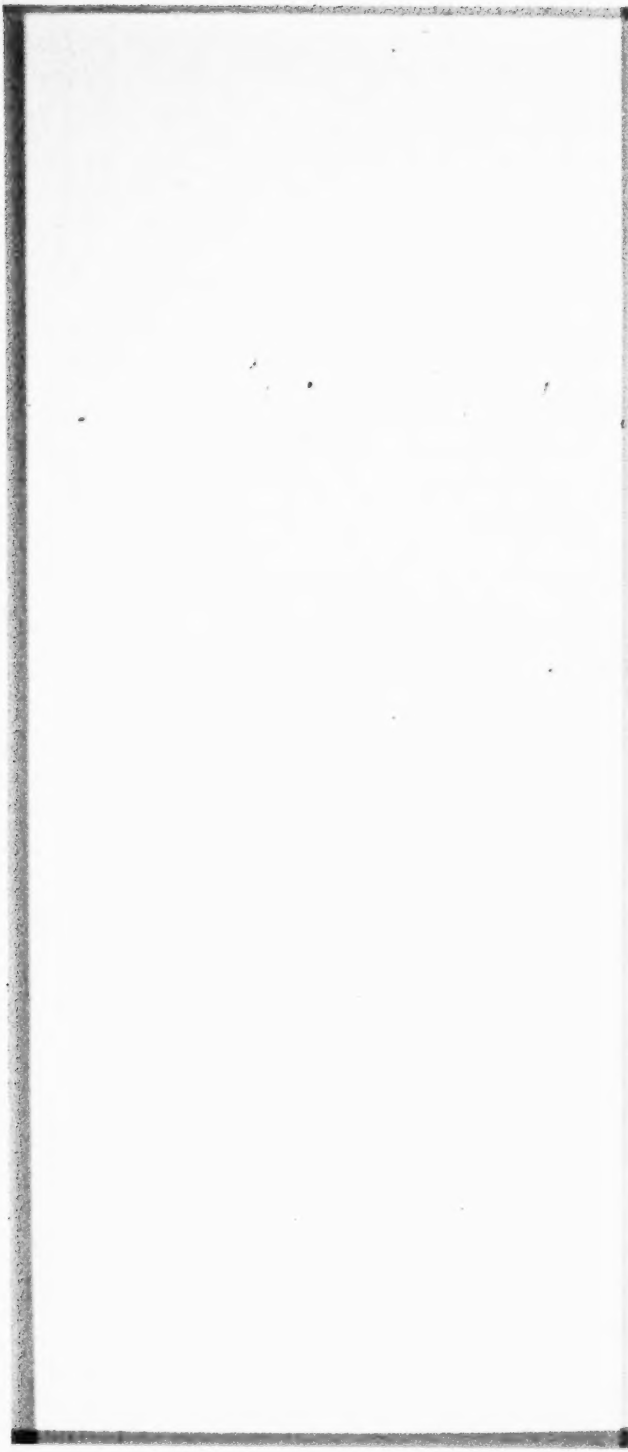
The respondents are in error, as the questions raised are not only significant but also involves the public interest.

RESPONDENTS STATE:

V. THAT AS TO PETITIONER'S APPEAL THE COURT OF APPEALS DECISION WAS CLEARLY RIGHT

The respondents are in error for reasons indicated below.

The case was tried by implied consent of the parties on the theory of liability of the anti-fraud provision of the Securities Exchange Act of 1934, Section 10(b) and Rule 10b-5 thereunder (Tr. 464, 553-4, 650 to 655)(A. 226-7) and there was a preponderance of evidence supporting the plaintiff's Trial Brief (Tr. 1047 to 1054, 1061-1062)(Pl. Ex. 43, Tr. 757 to 760) and the District Court refused petitioner's request to submit to the jury a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder (Tr. 1049-50, 1054).



Plaintiff's Exhibit 11-C & 42 were marked for Identification and indicates a figure in the LOSS column of 96,196.33 (See Page 18 of this brief).

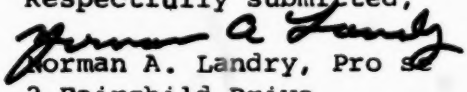
There was testimony (Tr. 150, 695, 716), that Hemphill, Noyes received some $7,000 in commissions.

An offer of proof was made (Tr. 171) in regards to rescission that it would be approximately $150,000.

CONCLUSION

For the forgoing reasons, as well as those which have been urged in the petition, certiorari should be granted.

Respectfully submitted,



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